69-1901-9294-2

OSH DIV Nos. 4371 and 4585

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Gary Bastian, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

vs.

East Range Builders & Supply, Inc.,

Respondent.

AMENDED FINDINGS OF FACT, CONCLUSIONS AND ORDER

The Findings of Fact, Conclusions and Order were issued by Administrative Law Judge Steve M. Mihalchick in the above-entitled matter on August 24, 1995, and there were clerical errors on page 11.

Therefore, corrected page 11 is attached.

Dated this ____ day of August, 1995

STEVE M. MIHALCHICK
Administrative Law Judge

6. The Department properly rated violations (a), (c), (d), (e), (g), (h) and (i) as serious violations within the meaning of Minn. Stat. § 182.651, subd. 12 (1994).

7. The Respondent has failed to establish any affirmative defenses to the violations found in Conclusion 4, supra.

8. The following proposed adjusted penalties for the violations found in Conclusion 4, supra, are reasonable based on the severity of the violation and its probability when appropriate credits are applied for the good faith of the Respondent, its size and its adverse violation history:

(a) 29 C.F.R. § 1926.451(y)(11) and (a)(4), and 29 C.F.R. § 1926.28(a)	$4,500.00
(b) 29 C.F.R. § 1926.1053(B)(6)	180.00
(c) 29 C.F.R. § 1926.451(y)(3)	1,035.00
(d) 29 C.F.R. (y)(4)(iii)	1,125.00
(e) 29 C.F.R. § 1926.451(a)(15)	1,125.00
(f) 29 C.F.R. § 1926.451(y)(2)	675.00
(g) 29 C.F.R. § 1926.500(g)(5)(vi)	972.00
(h) 29 C.F.R. 1926.500(b)(3)(ii)	972.00
(i) Minn. Rule 5207.0250, subp. 5,	1,256.00
(j) 29 C.F.R. 1926.58(f)(2)(i) and (ii)	405.00
(k) Minn. Rule 5206.0700, subps. 1 and 2	405.00
(l) Minn. Rule 5207.0035	405.00

9. Any Finding of Fact more properly termed a Conclusion and any Conclusion more properly termed a Finding of Fact is hereby expressly adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

1. The Citations herein are AFFIRMED.

2. The Respondent, East Range Builders, Inc., shall forthwith pay to the Department of Labor and Industry the sum of $13,055.00 as penalties for the affirmed citations.

Dated this ____ day of August, 1995

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Transcript Prepared from Tape Recording
Three Volumes
Carol J. Peplinski
Reporters Diversified Services
Duluth, Minnesota

MEMORANDUM

The matter involves two separate worksites and inspections. They were combined in the Order for Hearing and have been combined in this report because there was some overlap involving Inspector Gomes. The primary citations at the Hermantown site arise from improper use of a pump jack scaffold. Respondent has argued that no citation is proper because no employees were seen on the scaffolding. The inspector is not required to witness an employee exposed to a hazard to sustain a citation. In this matter, the circumstantial evidence is adequate to show that siding was being attached through the use of the scaffold at a height requiring guardrails, brackets, a Saf-T-Net, and proper alignment of the pole jacks. Siding was attached to the building and employees of East Range Builders spoke to the inspector about what they had been doing on the site.

The same argument, and the same result, applies to the citation for failing to adequately secure a ladder against displacement. Respondent criticizes the inspector for failing to photograph the base of the ladder to demonstrate that the ladder was placed on an unsuitable surface. The inspector testified as to the condition of the ground at the base of the ladder. In addition, a tie-off was attached to the ladder, but was not taut. If the ground was level and stable, there was no need for any tie-off. The presence of the tie-off also supports the conclusion that the ladder was on unstable ground.

Respondent argues that the wooden work bench meets the standards for rearguarding and pump jack construction. The wooden bench was not secured to the pump jack rear bracket to prevent displacement if an employee were to fall against it. The lack of the proper metal workbench, attached to the scaffolding, reduces the structural integrity of the entire scaffold. Any torque experienced by the scaffolding could lead to its failure without the proper workbench in place and secured.

The length of the metal workbench was alleged by Respondent to be too long to fit between the two lower portions of the building that protruded from the surface the pump jack was braced against. If the metal work bench is not adjustable to fit the space available, the proper action to take is not to use the pump jack; rather than use the pump jack in violation of OSHA standards and the manufacturer's instructions.

The penalty calculation is alleged to be arbitrary and capricious since the inspector was not consulted in eliminating the good faith and history credits. The Respondent has not shown that the inspector's participation would have resulted in any different penalty being imposed. The conclusion of the inspector's superior, to eliminate rather than reduce the credits, is based on the settlement agreement entered into by Respondent after the citations in this matter were issued. Eliminating the credits was not arbitrary or capricious.

Respondent argues that the citations in this matter cannot be repeat violations since the same standards are not cited in the settlement agreement as in the citations. This argument is overly technical and restrictive. The same subject matter, proper guarding and use of scaffolding, were present in both the settlement agreement and the citations. The prior citations are similar enough to support the conclusion that the scaffolding citations are repeat violations.

On the Virginia site, the fall guarding citations (outside of the chute citations) depend upon the parapets being insufficient to meet the fall guarding standard. That standard, 29 C.F.R. § 500, requires edges to be protected by a wall or guardrail system at least 39 inches high before work can be performed within six feet of the roof edge without fall protection. Parapets are defined as adequate to protect roof edges if the parapets are three feet in height. 29 C.F.R. 1926.502(p)(8). Most of the parapets were 24 inches or less in height. At several places, ramps were placed to move between roofs. But the ramps rose above the parapets and exposed employees to fall hazards of seventeen feet or more. The inspector saw no fall protection in use. Respondent's foreman on the site expressed his opinion that 24 inch parapets met the standard.

Respondent has maintained that it reasonably relied upon a statement allegedly made by Gomes at some prior time that 24-inch parapets were adequate to meet the fall protection requirement. Respondent also maintains that it submitted its safety policies to an OSHA inspector for review and comment and Respondent reasonably relied upon OSHA's failure to comment as approval of its safety policy. Neither of these positions is supported by caselaw. OSHA is under no obligation to review individual employer's safety policies. Moreover, even though it may have reviewed some of Respondent's policies, OSHA cannot alter the promulgated safety standards absent a proper rulemaking proceeding. Moreover, this ALJ does not believe that Gomes actually made any such statements or that any policy of Respondent referring to 24-inch parapets was ever approved.

Respondent's employee testified that he asked if parapets over 24 inches met the fall guarding requirement. Even assuming the OSHA inspector informed the employee that such parapets met the requirement, most of the parapets at the worksite are 24 inches or lower in height. Moreover, ramps were used which placed employees above the level of the parapets within two feet of a fall hazard. These ramps lacked guardrails. There is no reason advanced why Respondent could not simply examine the fall guarding standard and comply with that standard. Respondent could not

reasonably rely upon the contents of some informal and undocumented conversation to support a claim that the parapets 24 inches or lower meet the guarding requirement.

Respondent cites the Department Field Compliance Manual to support its assertion that the good faith and history credits should be, at most, reduced and not eliminated. Swanson testified as to the Department's practice of awarding history credits of ten, five, or zero percent history credits. Respondent's history supports an award of zero percent history credits. A good faith credit was awarded on the Virginia citations. The calculation of credits on the Virginia citation is appropriate.

As with the parapet height standard, Respondent asserts that it reasonably relied upon the statements of an OSHA inspector in not guarding the chute. Again, it is doubtful such a statement was made. Moreover, the standard for chutes is basic and not a standard that an employer should require assistance in meeting. There is no reason advanced as to why Respondent did not check the standard. There was no reasonable reliance upon a statement by an OSHA inspector.

Respondent maintains that there is insufficient evidence to support the citation that work was being done in the vicinity of the unguarded roof edges. Respondent relies upon the testimony of employees that only roofers were working at the roof edge. This argument does not account for the materials piled at the roof edge or the cement mixer located less than five feet from the parapet. There is ample evidence that nonroofing work was being done within the zone for which motion-stopping devices or guarding should have been provided.

The failure to monitor for or survey for asbestos is blamed, by Respondent, on the staff of the Virginia School District. The standard does not have a reasonable reliance provision. The Respondent's employees were exposed to asbestos because Respondent failed to require the School District to produce its survey of the materials present on the site. The standard exists to ensure that employees have a minimal assurance that they will not be exposed to hazardous materials. That purpose is defeated where an employer may rely upon the unsupported statement of another. The citations for failure to conduct a survey or monitor for asbestos is appropriate.

Similarly, the failure of Respondent to provide Right-to-Know training is blamed on Respondent's reliance on statements by School District staff. The analysis of the foregoing citation applies here. The reason for Right-to-Know training is to ensure that employees are aware of the hazards they face and make a knowing decision to continue that work. This purpose is defeated if an employer can avoid the citation by relying upon the unsupported assertion of a School District staff member.

The Judge has concluded that Respondent knew of the violations or could have known of the violations with the exercise of reasonable diligence. Grossman Steel & Aluminum Corp., supra. Reasonable diligence should uncover readily apparent hazards. See, Austin Building Code v. OSHRC, 647 F.2d 1063, 1067-68 (10th Cir. 1981); Kenneth P. Thompson Co., 1980 OSHD 24,593. The citations and proposed

penalties have been supported by adequate evidence. The Judge, therefore, concludes that it is appropriate to uphold the adjusted penalties for the citations listed in the Conclusions as reasonable.

S.M.M.